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District of Columbia Employers Must Provide Transportation Benefit Programs by the New Year

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Employers with employees located in the District of Columbia must provide a transportation benefit program to employees by January 1, 2016. This mandatory commuter benefit is among many environmental and sustainability initiatives required by the Sustainable DC Omnibus Amendment Act of 2014 (the "Act")¹ that the Mayor signed on July 29, 2014. Employers must act quickly to ensure they have a program in place by the deadline.

Requirements

Under the Act, a "covered employer" that must comply with the Act is an employer with 20 or more covered employees (full-time or part-time), although the Mayor has the authority to expand this definition to include employers with fewer than 20 employees. The Act relies on the definition for "employee" found in the DC Minimum Wage Act Revision Act of 1992, and includes any individual employed by a private, non-profit or public employer (excluding volunteers for an educational/charitable/religious or nonprofit organization, elected officials of religious organizations, and casual babysitters). Covered employees are those (1) who perform 50% or more of their work in D.C. or (2) whose employment is based in D.C. and perform a substantial amount of their work in D.C. and less than 50% in any other state. Any covered employees of the employer must become eligible for benefits under the program after 90 days of employment.

All covered employers must provide at least one of the following transportation benefit programs to employees:

1. A benefit program that allows employees to make a monthly pre-tax election to pay for commuter highway vehicle, transit, or bicycling benefits at benefit levels at least equal to the maximum amount that may be deducted for such programs from an employee's gross income;
2. An employer-paid benefit program whereby the employer supplies, at the election of the employee, a transit pass for the public transit system requested by each employee or reimbursement of vanpooling or bicycling costs in an amount at least equal to the purchase price of a transit pass² for an equivalent trip on the public transit system; or

¹ Title III, Subtitle A, "Reducing Single Occupancy Vehicle Use by Encouraging Transit Benefits" (Act Number A20-0385).

² "Transit pass" includes passes for travel by bus, streetcar, or train by the Washington Metropolitan Area Transit Authority, Maryland Area Regional Commuter, Virginia Railway Express, or the National Railroad Passenger Corporation (Amtrak).

3. Employer-provided transportation at no cost to the covered employee in a vanpool or bus operated by or for the employer.

If a covered employer fails to offer at least one of the above transportation benefit programs by January 1, 2016, the employer may be subject to civil fines and penalties pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985. Depending on the “class of infraction,” the fine for the first offense may range from \$50 to \$2,000. The fines increase with each subsequent offense, up to a range of \$400 to \$16,000 for the fourth and subsequent offenses.

Generally, an employee’s commuting expenses are not tax-deductible. However, there are limited exceptions for certain transit benefits described in Internal Revenue Code section 132(f). The Code and its corresponding Treasury Regulations³ provide the parameters for creating a tax-deductible transit benefit plan. In 2016, Treasury Regulations allow employers to provide up to \$130 per employee per month (\$1,560 per year) toward transit passes or vanpooling expenses. The employer may contribute toward the cost of the transit benefit or simply allow employees to defer their own compensation to fund the transit benefit.

In addition to providing these benefits, employers must notify employees of the available transit benefit program, provide information to covered employees on how to apply and receive benefits, and maintain records – such as records that notice was given to employees and records showing that elected benefits were provided – to establish compliance with the requirements.

Recommendations

The D.C. Department of Employment Services (“DOES”) has stated it will not begin enforcement of these requirements until April 1, 2016. For a 90-day period after the effective date of the requirements, DOES will provide outreach and education programs for employers. Additionally, DOES will be providing a template notice that employers can give to employees regarding the transit benefits.

Employers should determine whether their company already provides a transportation benefit plan for employees. If they do not, employers should consider which option would be best for their organization and employees. The District Department of Transportation (“DDOT”), through its initiative, goDCgo, offers an Employer Services program⁴ and an “Employer Transit Benefits Toolkit”⁵ to help employers implement a compliant transit benefit program.

As the deadline for putting in place a transit benefit program is looming, employers with employees in the District of Columbia should consult with employment law counsel familiar with the Act to determine whether any existing transit benefit program complies with the requirements of the Act or to create and implement a new, compliant transit benefit program before January 1, 2016.

3 Treasury Regulations Section 1.132-5..

4 Available at: <http://godcgo.com/home/commuter-benefits/employer-services.aspx>.

5 Available at: <http://godcgo.com/Portals/0/Employer-Toolkit-November-2014-Web.pdf>.